THE HON'BLE Dr.JUSTICE SHAMEEM AKTHER

C.C.C.A.No.50 of 2018

JUDGMENT:

This appeal is filed by the appellants/defendants 1 and 2, aggrieved by the order and decree dated 15.12.2017 in I.A.No.582 of 2017 in I.A.No.2221 of 2014 in O.S.No.1619 of 1996, on the file of the V Senior Civil Judge, City Civil Court, Hyderabad, wherein, the Court below allowed I.A.No.582 of 2017, directing the sale of the suit schedule property in the public auction and distribution of the sale proceeds thereof to the parties as per the preliminary decree dated 07.01.2004 passed in O.S.No.1619 of 1996.

2. Heard the learned counsel for the appellants-defendants and the learned counsel for the respondents-plaintiffs and perused the record.

3. The parties hereinafter referred to as plaintiffs and defendants as arrayed in the original suit.

4. The application filed by the plaintiffs in I.A.No.582 of 2017 was allowed by the Court below directing the sale of the suit schedule property in the public action and distribution of the proceeds thereof to the parties as per the preliminary decree dated 07.01.2004 passed in O.S.No.1619 of 1996. Aggrieved by the said order, the respondents in the I.A.No.582 of 2017, who are defendants in the main suit, have filed this appeal.

5. It is contended by the learned counsel for the appellants-defendants that the order impugned is contrary to law and facts of the case. The Court below after passing preliminary decree,

without jurisdiction, has passed the order directing the public auction of the suit schedule property. There is no pleading in the suit to grant such a relief and it is hit by Section 2 of the Partition Act. The suit was decreed preliminarily to grant 50% share to the plaintiffs by metes and bounds. The trial Court did not give valid reasons justifying the public auction of the suit schedule property. By virtue of passing of the preliminary decree, the rights of the parties were crystalised and without there being modification of the decree, the Court below ordered public auction of the suit schedule property which is illegal. The plaintiffs are not entitled to auction the properties and the order of the Court below is totally erroneous and without jurisdiction and against the principle of estoppels. The advocate Commissioner report is perverse and as per the terms of the preliminary decree, the defendants are entitled for 50% of the share over the suit schedule property and they want to retain the same for their residence and in the event of auction, the appellants/defendants would become homeless and ultimately prayed to set aside the order and decree dated 15.12.2017, passed in I.A.No.582 of 2017 in I.A.No.2221 of 2014 in O.S.No.1619 of 1996, on the file of the V Senior Civil Judge, City Civil Court, Hyderabad.

6. Learned counsel for the respondents-plaintiffs would contend that the extent of schedule land is 675 Sq. yards and is in triangular shape and if divided into two halves, the value decreases and its utility diminishes. The Advocate Commissioner Sri Nagaratnam divided into two plots, one of which is falling on the roadside and the other on the backside. Those who get the plot which is falling on the road side would be in

advantageous position. The second Advocate Commissioner Sri Sandesh Asthana filed interim report on 10.10.2013 along with the estimate of engineer stating that the existing sheds are to be dismantled and a compound wall is required to be constructed and the cost estimated is Rs.3,92,566/- and subsequently the said Advocate Commissioner Sri Sandesh Asthana passed away. Thereafter, some negotiations went in between the plaintiffs and the defendant No.1 to settle the matter amicably. The plaintiffs did not file any objections to the report. The division of property is not in the interest of both the parties as 220 sq. yards will be left for the common area and one party would be allotted a plot facing road and the other party would be allotted backside portion and the party who gets the plot on roadside would be on advantageous position and the party who gets plot on backside would be on disadvantageous position. Both the parties are at logger heads and benefit and enjoyment of property for both the parties is not possible. Further, the respondents-plaintiffs have got four grand children who in turn have to divide their property in the event of implementation of the advocate commissioner's report and the expenses shown by the Advocate Commissioner are also on higher side. The division of property in two shares is not practically feasible in the interest of the parties and the suit schedule property is required to be sold in public auction and the sale proceed to be distributed as per the preliminary decree. Taking into consideration all these aspects, the Court below passed the order directing public auction of the property, and ultimately prayed for dismissal of the appeal. In support of his submissions, learned counsel for the respondents-plaintiffs relied on the decision of the

Hon'ble Apex Court in ***Rani Aloka Dudhoria v. Goutam Dudhoria***[1].

7. In view of the submissions made on both sides, the point that arises for determination is_

> "Whether the order of the Court below to conduct public auction of suit schedule property and to distribute the sale proceeds thereof among the parties as per the preliminary decree dated 07.01.2004 passed in O.S.No.1619 of 1996, is sustainable?

8. Admittedly, no oral evidence is adduced by any party to the subject petition. The total extent of the land under dispute is 675 sq. yards and it is consisting one piece and structures. The pleadings and the evidence adduced on behalf of the plaintiffs in the original suit was to grant 50% of the share in the suit schedule property by dividing the property by metes and bounds and that was decreed on 07.01.2004, but on one reason or the other, the preliminary decree dated 07.01.2004 is not acted upon. The subject I.A was filed in the year 2017 stating that it is not possible to divide the suit schedule property in two shares and allocate one share to the plaintiffs and that there was no feasibility practically to do so. Sri G.Nagaratnam, Advocate Commissioner filed a report dated 13.02.2007, giving the sketch map proposing division of the suit property into two plots, of which, one is falling on the roadside and the other is falling on the backside. For this report, none of the parties to the litigation have filed objections. The second Commissioner Sri Sandesh Asthana had come up with a different proposal by way filing interim report dated 10.10.2013 proposing

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[1] (2009) 13 SCC 569

to dismantle the sheds and construction of a compound wall by spending Rs.3,92,566/- and he passed away some time back. Thereafter, a report was submitted by Sri Nagaratnam, Advocate Commissioner. It is submitted that the said Sri Nagaratnam made some discussions with the plaintiffs and defendant No.1 for amicable settlement and the defendant No.1 did not agree with the suggestion said to have been made as contended by the plaintiffs. Moreover, both the parties have not filed objections to the report of the Advocate Commissioner including the interim report. However, the right to seek reddressal in terms of preliminary decree cannot be defeated merely on that ground. The contention of the respondents-plaintiffs herein that because of falling of one piece of land on the roadside and other piece of land on the backside of the road and in the event of allotment of the said land in terms of the decree creates problem and it would not be beneficial to either of the parties and they are not willing for demolition of the sheds and they have also no interest to invest any money for construction of the passage as proposed by Sri Sandesh Asthana, Advocate Commissioner, is not sustainable.

9. In ***Rani Aloka Dudhoria*** (supra), the apex Court at paragraph 48 held that if there are number of shareholders or if there are any special circumstances, where a division of property cannot reasonably or conveniently be made, and that the sale of the property and distribution of the sale proceeds would be more beneficial to all the shareholders, the Court may, direct sale thereof subject to the condition that the request therefor had come from a shareholder or shareholders interested individually or collectively and a formal prayer to that effect is required to be

made and a positive finding that the property is incapable of division by metes and bunds would be necessary and that the property cannot be reasonably and conveniently be partitioned.

10. As per the submissions made by the learned counsel for the respondents-plaintiffs, the suit property has got 52 feet width on the road side and it is partially triangular and the total extent of the schedule property is 675 sq yards. Further more, the plaintiffs are not inclined to invest any money and do not want to lay road and they do not want to demolish the sheds and incur the expenses of Rs.3,92,566/- as proposed by the Advocate Commissioner. Further, defendants submit that they will become homeless and they have lot of attachment towards the suit schedule property. However, having so much attachment cannot be a ground to allow the contentions of the defendants. The apprehension of the plaintiffs is that they have four divisions in their family and the value of the property would be decreased in the event of partition making two shares, but it is not the case of the defendants herein. Certainly, the Court below in the beneficial interest of both the parties, when the suit schedule property is incapable of division by metes and bounds, finds it necessary to conduct public auction and distribute the sale proceeds, it can do so on an application of the shareholder or shareholders, individually or collectively.

11. As the total extent of the property is 675 sqs yards and as it is in Hyderabad city where people construct houses in 50 sq yards and less and put up their dwelling place, it can safely be concluded that the property is capable of division in terms of the preliminary

decree. In view of the decision relied on by the respondents-plaintiffs in ***Rani Alika Dudhoria*** *(supra 1)*, the submission made by the counsel for the appellants-defendants that the respondents-plaintiffs cannot take a stand without there being a pleading to sell the property, is unsustainable. In view of the said decision, the contentions raised with regard to application of Section 2 of The Partition Act, 1893 do not merit consideration.

12. It is pertinent to state that there is a Commissioner's report dividing the suit schedule property in two shares and the appellants-defendants have accepted to take backside of the property and offered to give front side of the property to the respondents-plaintiffs herein. It is also pertinent to state that the suit schedule property can be divided in two equal shares or values among the parties to the litigation. By any stretch of imagination, it cannot be said that the suit schedule property measuring 675 sq. yards cannot be reasonably or conveniently made into two shares. The finding of the Court below that the suit schedule property cannot be divided into two shares and such division is detrimental to the interests of the parties is unsustainable.

13. Therefore, the point is answered in favour of appellants-defendants and against the respondents-plaintiffs. Consequently, the order dated 15.12.2017, passed in I.A.No.582 of 2017 in I.A.No.2221 of 2014 in O.S.No.1619 of 1996, on the file of the V Senior Civil Judge, City Civil Court, Hyderabad, directing the sale of the suit schedule property in the public auction and distribution of the sale proceeds thereof to the parties as per the preliminary

decree dated 07.01.2004 passed in O.S.No.1619 of 1996 is liable to be set aside.

14. Accordingly, the appeal is allowed, setting aside the order dated 15.12.2017, passed in I.A.No.582 of 2017 in I.A.No.2221 of 2014 in O.S.No.1619 of 1996, on the file of the V Senior Civil Judge, City Civil Court, Hyderabad. Miscellaneous Petitions, if any, pending in this Appeal shall stand closed. There shall be no order as to costs.

Dr.SHAMEEM AKTHER,J

Date :01.02.2019
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